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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re SONY VAIO COMPUTER NOTEBOOK TRACKPAD LITIGATION	Case No. 09-cv-2109-AJB (MDD) [CORRECTED] PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL Date: May 30, 2013 Time: 2:00 p.m. Mag. Judge: Hon. Anthony J. Battaglia Courtroom: 2A

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Pursuant to Federal Rule of Civil Procedure 23 ("Rule" or "Fed. R. Civ. P."), Plaintiffs Christina Egner and Rickey Glasco ("Plaintiffs"), by and through their counsel, respectfully move for class certification. Plaintiffs also move to be appointed class representatives, and for their counsel to be appointed as class counsel pursuant to Rule 23(g).

I. Introduction

Sony Electronics, Inc. ("Sony") sold Plaintiffs and thousands of other consumers around the country expensive laptop computers under the VAIO brand name as the perfect mobile computing solution with premium mobility and performance. Although Sony promoted the VAIO notebook's performance, user experience and portability, Sony failed to inform purchasers the VAIO notebook's touchpad is defectively designed. [redacted] Hence the VAIO's faulty touchpad design causes the onscreen cursor to: (a) track in reverse; (b) freeze or fail to respond to a user's input on the touchpad; or (c) engage in erratic behavior (*e.g.*, randomly opening and closing windows and programs). As a result, the VAIO laptops cannot be used as intended.

[redacted]

[1] "Class Laptop" means Sony VAIO notebook series, VGN-NW, VGN-SZ, VGN-FZ, VPC-EB, and VPC-F. The Court restricted class discovery to these models, plus two additional series (VGN-CR and VGN-NR). (ECF No. 121). Class discovery revealed other Sony VAIO series suffer from the alleged touchpad defect, however, Sony redacted the information necessary to identify these additional models or otherwise failed to produce relevant information as "non-responsive." [redacted] Plaintiffs reserve their right to amend the Class Laptop definition once full discovery commences.

[redacted]

[redacted]

Plaintiffs move for class certification of their claims alleging violations of state consumer protection statutes and express and implied warranty laws. On behalf of themselves and thousands of others who purchased Class Laptops, Plaintiffs seek to certify two state classes, defined as: (1) all California residents who purchased a Class Laptop from March 16, 2006 through the present (the "California Class"); and (2) all New Jersey residents who purchased a Class Laptop from March 16, 2006 through the present (the "New Jersey Class"). Excluded from both classes are Sony Electronics, Inc., its officers and directors, families and legal representatives, heirs, successors, or assigns, or any entity in which Sony has or had a controlling interest.

Class certification is proper because Plaintiffs' claims and supporting evidence readily meet Rule 23(a)'s and Rule 23(b)(3)'s threshold requirements, and

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[redacted]

because the claims are more efficiently tried together. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). As Plaintiffs and class members all purchased Class Laptops infected with a common design and materials defect, this action is suitable for adjudication on a classwide basis.

II. Relevant Procedural Summary

On November 21, 2012, Plaintiffs filed a second amended consolidated complaint, alleging individual and class claims for violation of the Consumers Legal Remedies Act, California Civil Code §§ 1750 *et seq*. (CLRA), the Unfair Competition Law, California Business & Professions Code §§ 17200 *et seq*. (UCL), Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq*., express warranty, implied warranties of fitness and merchantability, common counts of assumpsit and declaratory relief, and the New Jersey Consumer Fraud Act, New Jersey Statute §§ 56:8-1 *et seq*., against defendants Sony and Best Buy Stores, L.P. ("Best Buy"). (ECF No. 136.) Sony answered the Complaint on December 10, 2012. (ECF No. 141.)

Plaintiffs served substantive class discovery, including document requests and interrogatories, and took depositions of Sony and Best Buy witnesses. Plaintiffs reviewed tens of thousands of pages of documents and consulted with experts to understand the defect plaguing the Class Laptops. After class discovery, the parties voluntarily agreed to dismiss Best Buy, which was entered on February 7, 2013. (ECF No. 149.)

III. Common Classwide Facts Support Certification

A. [redacted]

[redacted]

"At the class certification stage an expert is not charged with resolving factual disputes or determining the merits of the case." *In re Toyota Motor Corp. Hybrid Brake Marketing, Sales and Products Liability Litig.* ("*In re Toyota*"), 2012 U.S. Dist. LEXIS 151559, at *17 (C.D. Cal. Sept. 20, 2012); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011). Rather, Plaintiffs proffer the experts' opinions to demonstrate a "common … practice that could affect the class as a whole." *Id.*[4]

[3] [redacted]

[4] Plaintiffs do not concede Hillman or Vaughn are "experts" with respect to any opinion they offer via their reports or their depositions. Rather, Plaintiffs reference Hillman's testimony and publications as corroborating proof the "evidence" Sony intends to rely on supports class certification.

B. Class Laptops are similarly designed, marketed and sold

1. Sony fails to disclose the defect to consumers

[redacted]

2. Sony's uniform Class Laptop design and manufacturing

[redacted]

C. [redacted]

[redacted]

1. [redacted]

[redacted]

2. [redacted]

[redacted]

3. [redacted]

[redacted]

[redacted]

4. [redacted]

[redacted]

D. [redacted]

[redacted] [redacted]

> [redacted]

[redacted]

5 [redacted]

This defect not only frustrates Plaintiffs' and the proposed class' ability to operate the Class Laptops, the defect diminishes the Class Laptops' value by reducing their portability. Because computer operating systems like the Class Laptops use and rely on a "graphical user interface," *i.e.* visual windows, it is imperative the touchpads function correctly so users can operate the computer and access programs and information. A working touchpad is a key design feature necessary for portability. [redacted] A laptop with a defective touchpad, like the ones here, which result in the cursor tracking in reverse, closing programs arbitrarily, or freezing altogether, renders the laptop useless for its intended purpose. *See* Egner Decl. ¶¶ 6-7; Glasco Decl. ¶¶ 5-6. Having to purchase an external device to use a laptop is an increased cost to consumers and diminishes the Class Laptops' mobility and portability.

[redacted]

E. [redacted]

[redacted]

1. [redacted]

[redacted]

2. [redacted]

[redacted]

3. [redacted]

[redacted]

[redacted]

F. [redacted]

[redacted]

[redacted]

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6 [redacted]

[redacted]

The date Sony first learned the Class Laptops suffered from a defect is a merits inquiry, provable with common evidence. Indeed, this issue is proven (or defeated) via Sony's internal documents and testimony and is readily determinable on a classwide basis. Further, breach of warranty liability is strict, and thus Sony's

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7 [redacted]

knowledge is inconsequential. *See Butler v. Sears, Roebuck and Co.,* 702 F.3d 359, 363 (7th Cir. 2012), ("liability for breach of warranty is strict").

IV. Sony Spoliated Evidence When Examining Plaintiffs' Laptops

Against Plaintiffs objections, on November 5, 2012, a Protocol for Observation and Investigation of Touchpad was entered (the "Exam Protocol") (ECF No. 131). Plaintiffs objected to the Exam Protocol on numerous grounds, including any laptop disassembly and reassembly could result in permanent damage or manipulation and thus the examination must be conducted by a wholly "independent technician," and was "necessary to avoid the possibility of any advertent or inadvertent manipulation" by Sony "that may obscure manifestation of the defect." *See* (ECF No. 127) (Joint Motion for Discovery Dispute, at 9). Sony refused, and in fact Sony criticized Plaintiffs, and specifically told this Court, "Plaintiff's concerns are unfounded and simply a *delay tactic ... Plaintiff's concerns about improper disassembly and reassembly are purely speculative.*" *Id.* at 5 (emphasis added). Plaintiffs' objection notwithstanding, Sony went ahead with the hardware examinations by its proposed expert, Hillman.

[redacted]

[redacted]

[redacted]

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[11] The hardware examinations were video recorded and all references thereto are cited as follows: Volume Number @ Hour:Minute:Second. If it is beneficial to the Court plaintiffs will produce the video of Hillman's hardware examination.

[redacted]

V. Sony's Limited Warranty Expressly Covers The Alleged Defect

Sony provided a written warranty with each of the Class Laptops that warranted against defects in material or workmanship for one year from the original date of purchase. Ex. 18 at 428-429. The warranty provides:

> For a period of one year from the original date of purchase of the product, SONY will, at its option, repair or replace with new or refurbished products or parts, any products or parts determined to be defective.

Id. Sony's warranty expressly excludes anything other than "hardware components," and the warranty "does not cover technical assistance for hardware or software usage and it does not cover any software products whether or not contained in the Product." *Id.*

[redacted]

VI. It is Irrelevant Touchpad Malfunctions "May" Occur Due To Extrinsic Factors

Previously Sony claimed the touchpad problems alleged by Plaintiffs "may" be caused by extrinsic factors, such as software.[12] (ECF No. 19) (Sony Motion to Dismiss). [redacted]

[redacted] Courts routinely reject speculative causation claims, particularly at class certification. *See Wolin v. Jaguar Land Rover North Am., LLC,* 617 F.3d 1168, 1173 (9th Cir. 2010) ("Although individual factors may affect premature tire wear, they do not affect whether the vehicles were sold with an alignment defect."); *Keegan v. American Honda Motor Co., Inc.,* 284 F.R.D. 504, 526-27 (C.D. Cal. 2012) (rejecting identical argument by the defense that improperly focused on the symptom, in this case, tire wear, rather than the alleged defect, alignment geometry).

[12] This argument contradicts Sony's own documents and Plaintiffs' testimony (1) the touchpad problems manifested at or near the time of purchase prior to additional software programs being installed; (2) problems occurred when using the computer generally with no software programs open; and (3) touchpad settings were not modified and problems were experienced when the original touchpad drivers were installed. [redacted]

VII. [redacted]

VIII. Class Certification Is Proper And Warranted

A. Plaintiffs satisfy Rule 23's requirements

In a class action, the party seeking certification must establish Rule 23(a)'s four prerequisites are met. The prerequisites are (1) numerosity; (2) the existence of common questions of law or fact; (3) typicality of claims or defenses of the representative parties; and (4) fair and adequate protection of the interests of the class. Fed. R. Civ. P. 23(a). The parties must also satisfy either Rule 23(b)(2) or (b)(3). Rule 23(b)(3) is satisfied if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Plaintiffs bear the burden of establishing the requirements of Rules 23(a) and (b)(3). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001), amended by 273 F.3d 1266 (9th Cir. 2001). Courts should "perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims." *Dukes v. Wal-Mart Stores. Inc*., 603 F.3d 571, 594 (9th Cir. 2010) (*en banc*). Courts, however, should not resolve disputes regarding the merits; rather, a court should inquire into the merits only to determine whether the plaintiff has satisfied Rule 23's requirements. *Id*. at 586-87, 594.

"Class action certifications to encourage compliance with consumer protection laws," like this case, "are desirable and should be encouraged." *Johns v. Bayer Corp.*, 280 F.R.D. 551, 555 (S.D. Cal 2012); *Stone v. Advance Am.*, 278 F.R.D. 562, 568 (S.D. Cal. 2011). As discussed below, Plaintiffs have satisfied the requirements of Rule 23(a) and (b)(3).

1. Numerosity: the class is numerous and ascertainable

Rule 23(a)(1) requires the class be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). The proposed classes comprise all purchasers of Class Laptops in California and New Jersey from March 16, 2006 to the present. [redacted] Based on sales estimates the proposed class includes tens of thousands of class members, making joinder impracticable. A class this size readily satisfies the numerosity requirement. *See*, *e.g.*, *Quintero v. Mulberry Thai Silks, Inc.,* 2008 U.S. Dist. LEXIS 84976, at *7 (N.D. Cal. Oct. 22, 2008) ("As a general rule, classes numbering greater than forty individuals satisfy the numerosity requirement."); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 588 (C.D. Cal. 2011) (sales volume supported a finding of numerosity where class comprised all Coldcalm purchasers in California); *In re Abbott Labs. Norvir Anti-Trust Litig.*, 2007 U.S. Dist. LEXIS 44459, at *6 (N.D. Cal. 2007) (Where "'the exact size of the class is unknown, but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.'"). Rule 23(a)'s numerosity requirement is satisfied here.

Although there is no explicit requirement concerning the class definition in Rule 23, courts have held the class must be adequately defined and ascertainable before a class action may proceed. *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679-80 (S.D. Cal. 1999). "An identifiable class exists if its members can be ascertained by reference to objective criteria, but not if membership is contingent on a prospective member's state of mind." *Schwartz*, 183 F.R.D. at 679-80. In other words, it must be administratively feasible to determine whether a particular person is a class member. *See id*.

Whether one purchased a Class Laptop during a specific time period is an objective inquiry. [redacted] Class members can determine whether they have a Class Laptop simply by checking their Sony VAIO laptop model or serial number. [redacted]

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[13] *See also* Sony Service Bulletins and Technical News: Ex. 19 at 430-431 (Service Bulletin No. N10-059); Ex. 61 at 812-814 (Sony Technical News V10E077 issued October 14, 2010); Ex. 57 at 781-785 (Foxconn Technical News FXC10-036R1 issued October 15, 2010).

[redacted] Thus, plaintiffs proposed classes are readily ascertainable.

2. Commonality: common questions of law and fact exist

Rule 23(a)(2) requires plaintiffs to identify questions of law or fact common to the class. Commonality requires that plaintiff's "claims must depend upon a common contention … that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011). "[C]ommonality only requires a single significant question of law or fact … individualized issues raised go to preponderance under Rule 23(b)(3), not to whether there are common issues under Rule 23(a)(2)." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012). Individual factual variations among class members does not defeat underlying commonality. *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).

Here, the common contention upon which Plaintiffs' and class members' claims succeed or fail is whether the Class Laptops suffer from a common touchpad defect. Answering this common question will determine the validity of all class members' claims. Other common questions of law and fact include: (1) whether Sony knew of the defect; (2) whether Sony had a duty to disclose the defect; and (3) whether Sony violated consumer protection laws when it failed to disclose the defect. The Ninth Circuit has found an essentially identical set of common questions "easily satisfy the commonality requirement." *Wolin*, 617 F.3d at 1172.

These discrete common questions are straightforward and determinative for all class members. Plaintiffs' and class members' claims involve the same Class Laptops, the same defect, and the same material omissions. These common questions will generate common answers and enable the Court to determine Sony's liability in a single adjudication. Accordingly, the commonality requirement is "easily" satisfied. *See Wolin*, 617 F.3d at 1172.

3. Typicality: plaintiffs' claims are typical of the class

"'The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class.'" *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011) (quoting *Wolin*, 617 F.3d at 1175). The typicality requirement is liberally construed and does not require the claims be substantially identical. *See Hanlon*, 150 F.3d at 1020 ("Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical."). Moreover, the "typicality requirement looks to whether the claims of the class representatives [are] typical of those of the class, and [is] satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Stearns*, 655 F.3d at 1019.

Plaintiffs' claims are typical and align with the classes' claims because they all arise from and can be determined by a single, shared question: whether the Class Laptops have a touchpad defect. Plaintiffs Egner and Glasco, the proposed class representatives, each purchased a Class Laptop during the class period. Plaintiff Egner purchased her Sony VAIO VGNNW240F/P, a Class Laptop, on December 11, 2009, in Deptford, New Jersey. Ex. 2. Plaintiff Glasco purchased his Sony VAIO VGNNW240F/B, a Class Laptop, on January 9, 2010, in Sacramento, California. Ex. 3.

Plaintiff Egner's and Glasco's laptops suffer from the same defect plaguing the classes' computers. Plaintiff Egner and Plaintiff Glasco's touchpads both began acting erratically and jumping around soon after purchase. Egner Decl. at ¶¶ 6-7; Ex.

8, Egner Tr. at 27:8-17, 78:10-14, 86:25-87:12, 155:14-156:7; Glasco Decl. at ¶¶ 5-6; Ex. 9, Glasco Tr. at 118:24-121:22, 123:5-9, 141:11-14.

[redacted]

Similarly, plaintiffs Egner and Glasco each suffered economic loss by purchasing defective Class Laptops. Egner Decl. at ¶¶ 4-5; Ex. 8, Egner Tr. at 27:25-28:2, 76:1-4; Glasco Decl. at ¶ 4; Ex. 9, Glasco Tr. at 69:3-7. As each Plaintiff and proposed class member purchased a Class Laptop containing an undisclosed defect thereby suffering an economic loss, Plaintiffs' and the classes' interests are aligned in pursuing the underlying claims.

4. Adequacy: plaintiffs and their counsel will fairly and adequately protect the classes' interests

Rule 23(a)(4) requires the representative parties to protect the class's interests. "This factor requires: (1) that the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) that plaintiffs are represented by qualified and competent counsel." *Dukes*, 603 F.3d at 614. Any conflict must be actual, not speculative or hypothetical. *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) ("[the Ninth Circuit] does not favor denial of class certification on the basis of speculative conflicts.").

a) Plaintiffs' interests do not conflict with the classes' interests

Plaintiffs assert no unique or individual claims. Plaintiffs' claims arise from the same uniform omission and standard conduct of defendant Sony. Plaintiffs, like other class members, have a unifying common interest in establishing liability

14 [redacted]

against Sony for selling defective Class Laptops. Plaintiffs seek relief equally applicable and beneficial to all class members. Plaintiffs have no conflict of interest with the proposed classes.

Plaintiffs' substantial efforts in pursuing this litigation demonstrate their strong interest in achieving a successful result for the classes. Both plaintiffs have actively assisted counsel with this litigation. Plaintiff Egner flew from New Jersey to San Diego, California to attend the January 21, 2011, Court-ordered Early Neutral Evaluation conference. Egner Decl. at ¶ 22. Ms. Egner returned to San Diego on November 16, 2012, to testify under oath at a deposition, which began at 10:00 a.m. and concluded at 7:00 p.m. *Id.* She responded to extensive discovery propounded by Sony, which included 83 requests for production of documents and 15 interrogatories. *Id*. She submitted her VAIO laptop to a hardware, software and forensic exam by Sony, during which her touchpad was cracked. *Id*. Ms. Egner regularly communicates with counsel about the lawsuit and reviews relevant litigation-related documents. *Id*.; *see also* Ex. 8, Egner Tr. at 53:8-17, 19-23. Further, she understands the basis of the lawsuit, Egner Decl. at ¶¶ 17-21; Ex. 8, Egner Tr. at 40:23-41:5; 66:5-10; 105:1-10; 182:17-19, and her duties as a class representative. Egner Decl. at ¶¶ 23-25; Ex. 8, Egner Tr. at 93:1-8; 105:11-17; 182:9-13.

Likewise, on December 10, 2012, Plaintiff Glasco flew from Sacramento, California to San Diego for a five hour deposition in the middle of his school's finals week. Glasco Decl. at ¶ 18. He responded to discovery served by Sony, which included 83 requests for production of documents and 15 interrogatories, within one week of being joined as a plaintiff and class representative. *Id*. He submitted his Sony VAIO laptop to a hardware, software and forensic exam by Sony, during which his touchpad was cracked. *Id*. He submitted his Wacom tablet and external hard drive for examination by Sony. *Id.* And he regularly communicates with counsel regarding the lawsuit and has reviewed documents filed and served in the case, including the SAC. *Id.*; *see also* Ex. 9, Glasco Tr. at 61:10-66:12; 261:22-263:20. Further, he understands the basis of the lawsuit, Glasco Decl. at ¶¶ 17-21; Ex. 9, Glasco Tr. at 61:10-66:11; 222:6-225:13; 271:9-14, as well as his duties as a class representative. Glasco Decl. at ¶¶ 23-25; Ex. 9, Glasco Tr. at 220:18-222:4; 223:1-12. Plaintiffs Egner and Glasco will adequately protect the classes' interests.

b) Plaintiffs are represented by qualified and competent counsel

In reviewing proposed class counsel, courts consider "the work counsel has done in identifying or investigating potential claims in the action, counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, counsel's knowledge of the applicable law, and the resources counsel will commit to representing the class ...." Fed. R. Civ. P. 23(g)(l)(A).

On January 20, 2010, the Court appointed Doyle Lowther LLP and Zeldes & Haeggquist, LLP as interim lead counsel. (ECF No. 12.) Plaintiffs' counsel are experienced consumer class action litigators and are well qualified to represent the classes. Ex. 1 and Zeldes Decl. Plaintiffs' attorneys possess, and are committed to expending the skill, time, and resources needed to pursue this case to resolution as is evidenced by Counsels' efforts in filing four well-researched class action complaints and obtaining partial denial of Sony's motion to dismiss. (ECF Nos. 1, 13, 30, 49, 136) Plaintiffs' counsel mounted and responded to sizable class discovery, including the review of tens of thousands of documents in a short time frame, many relating to complex engineering and technical issues, argued several discovery motions, deposed Sony and Best Buy witnesses and conducted expert discovery. Counsel have acted vigorously in prosecuting this complex action on the classes' behalf. The substantial time and resources expended by plaintiffs' counsel demonstrate their commitment toward achieving a favorable result for the classes.

B. Plaintiffs satisfy Rule 23(b)(3)'s requirements

This action is maintainable under Rule 23(b)(3) because "questions of law or fact common to class members predominate over any questions affecting only individual members, and ... a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Common questions predominate over individual inquiries

"The predominance inquiry of Rule 23(b)(3) asks 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.' The focus is on 'the relationship between the common and individual issues.'" *Stearns,* 655 F.3d at 1019 (quoting *Mevorah v. Wells Fargo Home Mortg.*, 571 F.3d 953, 957 (9th Cir. 2009). Plaintiffs' claims, based on an undisclosed defect in the Class Laptops, raise questions of law and fact common to all class members, which predominate over any individual issues.

One common question predominates Plaintiffs' and class members' claims: do the Class Laptops suffer from a touchpad defect? Plaintiffs allege the Class Laptops contain an undisclosed defect, which causes the touchpad to malfunction. SAC at ¶ 2. Plaintiffs further allege they and the class were damaged by purchasing defective Class Laptops. *Id.* at ¶ 4. A determination by the trier of fact whether the Class Laptops contain a defect will resolve this common question for Plaintiffs and for all class members.

The fundamental defect is neither affected nor changed by any minor differences among the various Class Laptop series. *See Butler*, 702 F.3d 359 (reversing denial of class certification where class comprised of 27 different washing machine models and went through at least five design changes related to the purported defect). [redacted] The Ninth Circuit's recent *Wolin* decision is instructive on this point and rejects such arguments. In *Wolin*, the defendants argued common issues did not predominate because class members' vehicles did "not suffer from a common defect, but rather, from tire wear due to individual factors such as driving habits and weather." 617 F.3d at 1173. Rejecting this argument, the Ninth Circuit held,

> *proof of the manifestation of a defect is not a prerequisite to class certification*. What [defendant] argues is whether class members can win on the merits. For appellants' claims regarding the existence of the defect and the defendant's alleged violation of consumer protection laws, this inquiry does not overlap with the predominance test.

Id. (emphasis added) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.1975)). "[N]either the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies the Rule."

Like Plaintiffs assert here, *Wolin* held plaintiffs could prove the defect using common evidence: "All of these allegations are *susceptible to proof by generalized evidence*. Although individual factors may affect premature tire wear, they do not affect whether the vehicles were sold with an alignment defect." *Wolin*, 617 F.3d at 1173. The *Wolin* court also held plaintiffs' breach of written warranty claims could be tried with common proof:

> All of the proposed class members here are covered by a Limited Warranty that provides for the repair or replacement of defects, and all of the proposed class members allege that their vehicles suffer from the same defect. These claims require common proof of the existence of the defect and a determination of whether [defendant] violated the terms of its Limited Warranty. Accordingly, we conclude that common issues predominate regarding Land Rover's obligations under its Limited Warranty.

Id. at 1174.

When defendant Sony first learned of the defect in the Class Laptops is another merits inquiry common to all class members. [redacted]

Sony's knowledge of the defect is a common issue for all class members and is subject to proof on a classwide basis, as demonstrated by the evidence cited herein. A determination by the trier of fact as to when Sony knew the Class Laptops contained a defect will resolve this common question for plaintiffs and for all class members.

2. Plaintiffs seek to certify consumer protection and warranty claims under California and New Jersey law

a) California's Unfair Competition Law

"[T]he primary purpose of the unfair competition law … is to protect the public from unscrupulous business practices." *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 975 (1992), *see also In re Tobacco II Cases* ("*Tobacco II*"), 46 Cal. 4th 298, 312 (2009). The UCL imposes strict liability on anyone who violates its prohibitions and the "scope of the UCL is quite broad." *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1471 (2006); *see also Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 181 (2000) (plaintiff need not show a UCL defendant intended to injure anyone by deceitful or unfair conduct). Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria ("unlawful," "unfair," or "fraudulent") to violate the UCL. *McKell*, 142 Cal. App. 4th at 1471.

"Unlawful" business acts or practices which violate the UCL include "'anything that can properly be called a business practice and that at the same time is forbidden by law.'" *Id*. at 1475 (*citing Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)) (internal quotations omitted). The UCL therefore permits violations of other laws to be treated as unfair competition that is independently actionable. *Id.* Violating an underlying law is a *per se* UCL violation. *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (1994).

A UCL "unfair" prong violation may be established by weighing "the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1104 (1996). A business practice is unfair when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 530 (1984). Further, "relief under the UCL is available without individualized proof of deception, reliance and injury." *Stearns,* 655 F.3d at 1020-21 (citing *In re Tobacco II Cases*, 46 Cal. 4th at 207, 320).

b) California's Consumers Legal Remedies Act

California's Consumers Legal Remedies Act (CLRA) prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770(a). A defendant is liable under the CLRA if it misrepresents its goods possess certain characteristics, uses or benefits that they do not have, or misrepresents they are of a particular standard, quality or grade when they are not. Cal. Civ. Code § 1770(a)(5) and (7). The statute is violated "in a transaction intended to result or which results in the sale or lease of goods or services …." Cal. Civ. Code § 1770(a).

To establish a CLRA claim Plaintiffs must show defendant Sony's omission or failure to disclose the defect in the Class Laptops caused them harm. *Stearns*, 655 F. 3d at 1022. Under the CLRA "[c]ausation, on a classwide basis, may be established by *materiality*." *Id.* (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009)). Materiality is an objective standard subject to common proof and "suitable for treatment in a class action." *Mass Mutual Life Ins. Co. v. Super. Ct.*, 97 Cal. App. 4th 1282, 1294 (2002).

Importantly, "at this stage in the litigation, the issue is not whether the alleged [omissions] were in fact material. The proper inquiry for class certification purposes is whether plaintiff can use common proof to prove whether a misrepresentation or nondisclosure is material." *Krueger v. Wyeth, Inc.*, 2011 U.S. Dist. LEXIS 154472, at *17 (S.D. Cal. Mar. 30, 2011). Sony never disclosed the defect. The question is whether a reasonable person contemplating a Class Laptop purchase would attach importance to Sony's omission the computers contained a defect. The answer is subject to common proof.

c) New Jersey Consumer Fraud Act

To establish a New Jersey Consumer Fraud Act (NJCFA) claim, plaintiffs must demonstrate: "(1) unlawful conduct on the part of" Sony, "(2) an ascertainable loss on the part of plaintiffs, and (3) a causal relationship between the unlawful conduct and the ascertainable loss." *In re Mercedes-Benz Tele Aid Contract Litig.,* 257 F.R.D. 46, 73 (D.N.J. 2009). The NJCFA is construed liberally in consumers' favor. *Cox v. Sears Roebuck & Co.,* 138 N.J. 2, 15-16 (N.J. 1994) (collecting cases); *Dal Ponte v. Am. Mortg. Express Corp.*, 2006 U.S. Dist. LEXIS 57675, at *19 (D.N.J. Aug. 17, 2006) ("The available legislative history demonstrates" the statute "was intended to be one of the strongest consumer protection laws in the nation.").

The first prong requires Plaintiffs to prove Sony knew or should have known the Class Laptops were defective, but omitted this fact when advertising and selling the Sony Class Laptops. *See* N.J. Stat. Ann. § 56:8-2 (declaring unlawful "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact ... in connection with the sale or advertisement of any merchandise or real estate."). As in *In re Mercedes-Benz*, here, "the issues for trial relating to the first element of Plaintiffs' consumer fraud claim turn on the knowledge and actions of the company rather than those of the individual class members, and are therefore common to the class." 257 F.R.D. at 73.

The second element, “ascertainable loss,” does “not require Plaintiffs to prove that they relied on [Sony’s] alleged [omissions].” *In re Mercedes-Benz*, 257 F.R.D. at 73. “Plaintiffs need only show that they ‘paid for a product and got something less than what had been promised.’” *Id.* (citing cases); *Dal Ponte*, 2006 U.S. Dist. LEXIS 57675, at *25 (the NJCFA does not require proof of reliance). By limiting the proposed class to only those consumers who purchased a Sony VAIO containing the defect, Plaintiffs’ have established ascertainable loss, *i.e.*, the loss in value of a notebook containing defective materials and associated repair costs.

Causation, the final element of Plaintiffs’ consumer fraud claim, can also be established using common proof. The NJCFA does not require Plaintiffs to demonstrate they relied on misstatements. N.J. Stat. Ann. § 56:8-2 (allowing recovery ‘“whether or not any person has in fact been misled, deceived or damaged’” by the defendant’s misrepresentation or omission); *In re Mercedes-Benz,* 257 F.R.D. at 74 (citing cases). Plaintiffs did not get what they paid for because of Sony’s wrongdoing. Plaintiffs did not know their notebook computers contained defective touchpad materials causing it to malfunction during normal use.

d) Breach of express and implied warranty

Sony provides a written express warranty with each VAIO laptop. The VAIOs are warranted against defects in material or workmanship for one year from the original date of purchase. Ex. 18 at 427-428. The express warranty covers product issues caused by defects in material or workmanship during ordinary use as they relate to hardware components packaged with the product. Ex. 18 at 427-428. Pursuant to its express warranty, Sony is obligated to repair or replace the defective laptop. Ex. 18 at 427-428.

Plaintiffs and all class members were covered by Sony’s express warranty that provides for defect repair or replacement of defective products. Ex. 18 at 427-428. Plaintiffs allege all Class Laptops suffer from a common defect and Sony has refused to repair the defect under its warranty. SAC at ¶¶ 2-6. Plaintiffs' express warranty claims require common proof of the defect's existence and whether Sony violated its written warranty by failing to repair the defect. *Wolin*, 617 F.3d at 1174; *Elias v. Ungar's Food Prods., Inc.*, 252 F.R.D. 233, 249-251 (D.N.J. 2007), *adopted by* 252 F.R.D. 223 (D.N.J. 2008). Accordingly, common issue predominate Plaintiffs' breach of express warranty claims. *Id.*

To establish an implied warranty of merchantability claim or Song-Beverly Act violation, Plaintiffs must prove the goods purchased were not merchantable. Cal. Civ. Code § 1792; N.J. Stat. Ann. § 12A:2-314; *see also Montich v. Miele USA, Inc.*, 849 F. Supp. 2d 439, 455 (D.N.J. 2012) ("[T]he Court can discern no conflict between New Jersey's law of the implied warranty of merchantability – as applied to the retail sale of new consumer goods – and California's Song-Beverly Act."). Plaintiffs' implied warranty claim arises from the fact the Class Laptops contain a defect, proof of which is common to all class members. *See Sanbrook v. Office Depot, Inc.*, 2009 U.S. Dist. LEXIS 30857, at *16 (N.D. Cal. Mar. 30, 2009) (finding "The Song-Beverly class claim is significantly subject to common proof. The nature of the Song-Beverly violation is common to all class members."); *Tait v. BSH Home Appliances Corp.*, 2012 U.S. Dist. LEXIS 183649, at *52 (C.D. Cal. Dec. 20, 2012) ("Because an implied warranty claim requires an objective standard and because Plaintiffs' theory here is grounded in a defective design common to all Washers, the 'breach of implied warranty claim is therefore susceptible of common proof.'"). Plaintiffs' implied warranty of merchantability is appropriate for class certification.

For the same reason, certification of Plaintiffs' Magnuson-Moss Act claim is appropriate. The Magnuson-Moss Act provides a federal cause of action for state law implied warranty or express warranty claims. *Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929, 954 (C.D. Cal. 2012). By showing a violation of California's and New Jersey's express warranty and implied warranty of merchantability laws through common proof, Plaintiffs also establish a violation of Magnuson-Moss. 15 U.S.C. § 2310(d); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) ("claims under the Magnuson-Moss Act stand or fall with [plaintiffs'] express and implied warranty claims under state law"); *Glauberzon v. Pella Corp.*, 2011 U.S. Dist. LEXIS 38138, at *18 (D.N.J. Apr. 7, 2011) (Magnuson-Moss claim is a derivative of the state law claims for breach of express and implied warranty). Therefore, common legal issues also predominate as to Plaintiffs' Magnuson-Moss claim.

3. A class action is a superior method of adjudication

Rule 23(b)(3) requires a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The following factors are relevant in determining superiority: (1) the class members' interest in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation and claims in this forum; and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3) (A)-(D). A class action may be superior "[w]here classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). It also is superior when no realistic alternative to a class action exists. *Id.* at 1234-35.

Plaintiffs' claims raise classwide questions concerning a defect in the Class Laptops. These questions will be answered by common evidence. Trying each class member's claim separately would be inefficient, when each case would allege identical misconduct and offer identical proof of Sony's liability for a defect in the Class Laptops. Forcing each class member to proceed in a separate suit would also waste judicial resources and risk producing conflicting precedent. Separate suits would be inapposite to Rule 23's goals of efficiency and economy.

The costs necessary to prosecute an individual product defect lawsuit would "dwarf [the] potential recovery" from any individual suit. *Hanlon*, 150 F.3d at 1023. Where, as here, "each member's claim is likely too small to be worth pursuing in an individual action ... a class action may be the only method for providing meaningful recovery." *Miletak v. Allstate Ins. Co.*, 2010 U.S. Dist. LEXIS 26913, at *36 (N.D. Cal. March 5, 2010); *see also Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1218 (9th Cir. 2008) ("when consumer claims are small but numerous, a class-based remedy is the only effective method to vindicate the public's rights").

Finally, certification presents no serious manageability difficulties. Proof of liability is based on common evidence whether the Class Laptops contain a defect causing the touchpads to malfunction. This action's resolution on a classwide basis is manageable. Plaintiffs are unaware of any other litigation concerning this controversy. Class members' potential interests in individually controlling the prosecution of separate actions and the potential difficulties in managing this class action do not outweigh the benefits of concentrating this matter in one litigation. *See* Fed. R. Civ. P. 23(b)(3)(A), (C), (D). Therefore, the proposed classes are properly certified under Rule 23(b)(3).

IX. Conclusion

Plaintiffs satisfy Rule 23's requirements. Plaintiffs respectfully request the Court enter an order: (1) certifying a California and New Jersey class; (2) appointing Plaintiffs as class representatives for the respective classes; (3) appointing Doyle Lowther LLP and Zeldes & Haeggquist, LLP as class counsel; and (4) granting such other relief as the Court deems appropriate.

Dated: February 28, 2013 DOYLE LOWTHER LLP

/s/ John Lowther

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